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THE SUPREME COURT OF THE STATE OF ALASKA

ALASKA POLICE )  
STANDARDS COUNCIL, )  
 ) Supreme Court No. S-15364  
Appellant, )  
 ) Superior Court No. 1JU-12-00728 CI  
v. )  
 ) O P I N I O N  
LANCE PARCELL, )  
 ) No. 6999 – April 17, 2015  
Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Louis J. Menendez, Judge.

Appearances: Kathryn R. Vogel, Assistant Attorney General, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for Appellant. Stephen F. Sorensen, Simpson, Tillinghast, Sorensen, & Sheehan, P.C., Juneau, for Appellee.

Before: Fabe, Chief Justice, Winfree, Stowers, Maassen, and Bolger, Justices.

WINFREE, Justice.

**I. INTRODUCTION**

The level of deference we afford to an underlying decision often is key to the resolution of an appeal, and this case makes that point crystal clear. A police officer’s employment was terminated for abuse of alcohol, sexually offensive remarks made to two female officers, and alleged dishonesty during the subsequent police

investigation. An arbitrator concluded that terminating the officer's employment was an excessive penalty and ordered the officer's reinstatement. The superior court affirmed the arbitration decision and we affirmed the superior court based on the deference that must be given to an arbitration decision. However, the Alaska Police Standards Council revoked the officer's police certificate after concluding that the officer was not of good moral character and was dishonest. The superior court reversed the decision to revoke, substituting its judgment for the Council's. But because the Council's decision, like that of the arbitrator, is entitled to deference, we reverse the superior court's decision and affirm the Council's decision to revoke the officer's police certificate.

## II. FACTS AND PROCEEDINGS

This is the second time the underlying facts of this case have come before us. In 2006 the Airport Police and Fire Department of the Alaska Department of Transportation terminated Lance Parcell's employment for harassing conduct and evasiveness during the Department's subsequent review. In *State v. Public Safety Employees Ass'n (PSEA 2010)*<sup>1</sup> we affirmed a superior court decision refusing to vacate a labor arbitrator's decision to reinstate Parcell.<sup>2</sup>

The Alaska Police Standards Council subsequently revoked Parcell's police certificate, but the superior court on appeal reversed the Council's decision. The Council now appeals from the superior court's decision.

In *PSEA 2010* we introduced most of the relevant factual background:

[Parcell] had been employed as an officer with the Department for approximately four years when he was terminated on August 24, 2006. The termination was based on two events that occurred in May 2006 while [Parcell] was

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<sup>1</sup> 235 P.3d 197(Alaska 2010).

<sup>2</sup> *Id.* at 203.

working at the Alaska Law Enforcement Academy in Sitka, Alaska and on [Parcell's] conduct during the subsequent investigation.

On May 5, 2006, [Parcell] and two other training officers went to a bar in Sitka, and [Parcell] became extremely intoxicated. While at the bar, [Parcell] slid toward a female officer on a couch and made inappropriate sexual remarks, telling her “that he wanted to make her come, that he could make her scream, [and] that he could push her buttons.” The female officer told him to stop, but he repeated the comments several times. Because [Parcell] was too intoxicated to walk home that night, another officer drove him home. When they returned to the Academy, [Parcell] vomited outside and then, after the hallways were cleared of recruits, he was helped into an Academy building to a room where he could sleep. [Parcell] apologized to the female officer in person the following day and by email several days later. [Parcell] stated during the internal investigation and to the arbitrator that he does not remember making these inappropriate remarks to the female officer.

On the evening of May 17, 2006, [Parcell] stared at another female officer while they were watching television and later sent her unwelcome text messages in which he invited her to “go on a beer run,” “go out and have fun,” and join him in the room where training officers are allowed to sleep to “talk to him if she wanted.” She told him to stop sending the messages, but he continued to do so. The following morning, [Parcell] sent the officer an email calling her his “sexy new friend,” telling her she had “a great [a]ss” and “very nice tits,” and stating that he wanted to see her nipple rings. The female officer wrote an email expressing her anger with his behavior, and [Parcell] subsequently sent her an email apology. [Parcell] testified at arbitration that he was up all night drinking prior to sending the email, a fact supported by the female officer's statement during the investigation that she smelled alcohol on [Parcell] when she saw him that morning.

Following these events, another officer filed a complaint regarding [Parcell's] behavior. Upon receiving the complaint, Lauri Burkmire, Chief of the Department, initiated an administrative inquiry, assigning a lieutenant to conduct witness interviews and a site visit. In his report, the lieutenant "concluded that [Parcell's] conduct violated . . . Department rules relating to unbecoming conduct, courtesy, sexual harassment, private conduct and truthfulness, immoral conduct (deception), and harassment" and identified "eight instances in which he felt [Parcell] had been less than truthful in the investigation."

After reviewing the report, Chief Burkmire sent [Parcell] a letter directing him to attend a meeting on August 18, 2006 to discuss "inconsistencies in your claims and your honesty regarding this matter." She reminded [Parcell] of his obligation to be honest and warned that failure to do so could result in his dismissal. [Parcell] attended the meeting with his representative from [the Public Safety Employees Association] and, according to the arbitrator, admitted that he had not been honest in his interview with the lieutenant. At arbitration, [Parcell] testified that his dishonesty in his interview during the investigation was limited to downplaying the extent of his drinking. Chief Burkmire terminated [Parcell] several days after their meeting.

[Parcell] testified at arbitration that immediately following his termination, he enrolled in an outpatient alcoholic treatment program, which he successfully completed in eight months. At the time of his testimony before the arbitrator, he claimed he had been sober for fifteen months. He acknowledged that his remarks on May 5 and his email of May 18 were "inappropriate and rude," admitted that he had "failed to uphold the high standard of his profession," and stated that he was "very ashamed of his behavior."<sup>3</sup>

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<sup>3</sup> *Id.* at 199-200 (internal footnote omitted).

The parties in this case stipulated to these facts and they are quoted verbatim in the Council's decision.

After the Department terminated Parcell the Public Safety Employees Association filed a grievance on his behalf, and the matter eventually went to arbitration.<sup>4</sup> The arbitrator found, in relevant part, that: (1) Parcell's behavior was "totally contrary to [his] professional responsibility," "sexually offensive," and "as far over the line as one could imagine"; and (2) "although the Department did not establish that [Parcell] had lied, it did prove that he 'was evasive, misleading and not forthcoming' in the investigatory process."<sup>5</sup> By only "the slimmest margin" the arbitrator found that Parcell should be reinstated. The Department then moved in the superior court to vacate the arbitration decision, but the superior court denied the Department's request.

The Department appealed to this court and in *PSEA 2010* we affirmed the superior court's decision, noting the "deferential standard" afforded arbitration decisions, which was "key to the decision we reach[ed]."<sup>6</sup> And we explained that "[i]f we were reviewing this case in the first instance, or under a less deferential standard, we likely would not have reached this conclusion."<sup>7</sup>

While Parcell's employment matter was progressing, the Alaska Police Standards Council independently sought to revoke Parcell's police certificate. The revocation proceedings were stayed pending resolution of the employment matter, but after our *PSEA 2010* decision the Council served Parcell with its "Third Amended Accusation" and resumed the revocation proceedings. The thrust of the Council's

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<sup>4</sup> *Id.* at 200.

<sup>5</sup> *Id.* (alteration in original).

<sup>6</sup> *Id.* at 201.

<sup>7</sup> *Id.* at 202.

position was that because Parcell lacked good moral character and was dishonest, revocation of Parcell's certificate was appropriate.

A hearing officer was appointed, but Parcell and the Council agreed that an evidentiary hearing was unnecessary and stipulated to the facts noted in our *PSEA 2010* decision. The hearing officer found that the Council did not meet its burden in proving that: (1) Parcell had been discharged for cause;<sup>8</sup> or (2) Parcell is not a person of good moral character.<sup>9</sup> The hearing officer therefore concluded that revocation of Parcell's police certificate was unwarranted, stating that "[p]er the stipulation of the parties, Parcell's conduct was egregious, rude, and grossly offensive" but not sufficient to establish a lack of good moral character.

The Council disagreed with the hearing officer's proposed decision and pursued revocation.<sup>10</sup> Parcell provided the Council additional evidence to establish his good moral character. The Council issued a written decision evaluating whether Parcell: (1) had been terminated for conduct that "would cause a reasonable person to have substantial doubt about [his] honesty, fairness, and respect for the rights of others and for

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<sup>8</sup> See 13 Alaska Administrative Code (AAC) 85.110(b)(3) (2014) (requiring revocation when an officer "has been discharged . . . from employment as a police officer in this state or any other state or territory for cause for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for the rights of others").

<sup>9</sup> See 13 AAC 85.110(a)(3) (providing for discretionary discharge when an officer "does not meet the standards in 13 AAC 85.010(a) or (b)"); 13 AAC 85.010(a)(3) (requiring that a person hired as a police officer "is of good moral character").

<sup>10</sup> AS 44.62.500 allows agencies to adopt hearing officer decisions, but an agency is not required to adopt a hearing officer's decision and "may decide the case upon the record, including the transcript, with or without taking additional evidence, or may refer the case to the same or another hearing officer to take additional evidence."

the laws of this state”;<sup>11</sup> and (2) is not of “good moral character.”<sup>12</sup> In addition to the evidence of Parcell’s inappropriate sexually offensive remarks, the Council considered the evidence that he had been dishonest during the department’s subsequent investigation, stating:

Parcell “was evasive, misleading, and not forthcoming”. . . [and t]he agreed upon facts, the arbitrator decision, superior court order, and Supreme Court opinion leave no room to debate that [the Department chief and investigating officer] are of the opinion that Parcell was dishonest in eight specific instances during the administrative investigation. Parcell’s engaging [in] the dishonest behavior renders him unable to effectively perform the duties of a law enforcement officer in connection with making applications to the court — including search and arrest warrant applications, and court testimony.

The Council concluded that Parcell “is not a person the citizens of our great State of Alaska can entrust with private personal information, the lives and safety of themselves and their loved ones, and be counted on to do the right things for the right reasons” and that his “dishonesty significantly and substantially impairs his ability to perform the responsibilities of a law enforcement officer.” The Council revoked Parcell’s certificate. Parcell appealed to the superior court.

The superior court concluded that the Council’s moral character determination was not entitled to deference because good moral character “is a standard eligibility requirement in professions serving the public” so its meaning “is not one

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<sup>11</sup> 13 AAC 85.110(b)(3).

<sup>12</sup> 13 AAC 85.110(a)(3) (“The council will, in its discretion, revoke a . . . certificate upon a finding that the holder . . . does not meet the standards in 13 AAC 85.010(a) or (b).”); 13 AAC 85.010(a)(3) (“A participating police department may not hire a person as a police officer unless the person . . . is of good moral character.”).

unique to the Council.” The court agreed with the hearing officer’s statement that a person lacking good moral character has character flaws “that are ingrained, lasting, or causing consistent behavioral or decision making problems.” The court then summarized various certificate-revocation decisions from other jurisdictions involving police officers who had behaved more egregiously than Parcell. It faulted the Council for not considering the good aspects of Parcell’s character, including his employment for four years before the May 2006 incidents, his maintaining sobriety since the incidents, and that he “was actively engaged in the community, and had the support of his local [r]abbi.” Finally, the court concluded that the Council’s interpretation of “good moral character” was unreasonable.

The superior court also reviewed the Council’s finding that Parcell had been dishonest. The court concluded that the finding was not supported by substantial evidence and disagreed that Parcell’s conduct “would be considered exculpatory information in cases in which he is involved, such that the arbitrator’s findings would preclude Parcell from performing his duties as a police officer.”

The Council appeals.

### **III. STANDARD OF REVIEW**

“Where the superior court is acting as an intermediate court of appeals, we directly review the agency decision. Questions of fact are reviewed for substantial evidence. Questions of law involving agency expertise are reviewed using the reasonable [or rational] basis test . . . .”<sup>13</sup> We have explained that:

[T]wo circumstances generally call for rational basis review:  
(1) “where the agency is making law by creating standards to

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<sup>13</sup> *West v. Municipality of Anchorage*, 174 P.3d 224, 226 (Alaska 2007) (internal footnotes omitted) (citing *Thoeni v. Consumer Elec. Servs.*, 151 P.3d 1249, 1253 (Alaska 2007); *State v. Pub. Safety Emps. Ass’n*, 3 P.3d 409, 413 (Alaska 2004)).



be used in evaluating the case before it and future cases,” and (2) “when a case requires resolution of policy questions which lie within the agency’s area of expertise and are inseparable from the fact’s underlying the agency’s decision.”<sup>[14]</sup>

“Where questions of law do not involve agency expertise, the appropriate standard of review is ‘substitution of judgment . . . .’ ”<sup>15</sup> “We review an agency’s application of its own regulations for whether the agency’s decision was ‘arbitrary, unreasonable, or an abuse of discretion.’ ”<sup>16</sup>

#### **IV. DISCUSSION**

##### **A. It Was Error To Apply The Substitution Of Judgment Standard To The Council’s Decision On Good Moral Character.**

Noting the “primary public interest that applicants meet minimum standards for employment as police officers”<sup>17</sup> the legislature created the Alaska Police Standards Council.<sup>18</sup> The Council may “establish minimum standards for employment as a police officer”<sup>19</sup> and the Council may establish mandatory qualifications for police officers “including minimum age, education, physical and mental standards, *moral character*,

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<sup>14</sup> *W. States Fire Protection Co. v. Municipality of Anchorage*, 146 P.3d 986, 989 (Alaska 2006) (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

<sup>15</sup> *Alaska Exch. Carriers Ass’n v. Regulatory Comm’n of Alaska*, 202 P.3d 458, 460 (Alaska 2009) (quoting *Tesoro Alaska Petroleum Co.*, 746 P.2d at 903).

<sup>16</sup> *Id.* at 461 (quoting *Griffiths v. Andy’s Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007)).

<sup>17</sup> AS 18.65.130.

<sup>18</sup> AS 18.65.140.

<sup>19</sup> AS 18.65.220.

and experience.”<sup>20</sup> If an applicant satisfies the Council’s mandatory qualifications, then “[t]he [C]ouncil shall issue a certificate evidencing satisfaction of the requirements.”<sup>21</sup> But if a police officer fails to continue to satisfy the Council’s standards, the Council may revoke the officer’s certificate.<sup>22</sup>

The Council has adopted regulations establishing grounds for mandatory revocation<sup>23</sup> and grounds for discretionary revocation.<sup>24</sup> The Council may in its discretion revoke an officer’s certificate if the officer is not “of good moral character.”<sup>25</sup> In its regulations the Council has defined good moral character as:

the absence of acts or conduct that would cause a reasonable person to have substantial doubts about an individual’s honesty, fairness, and respect for the rights of others and for the laws of this state and the United States; for purposes of this standard, a determination of lack of “good moral

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<sup>20</sup> AS 18.65.240(a) (emphasis added).

<sup>21</sup> AS 18.65.240(b).

<sup>22</sup> AS 18.65.240(c).

<sup>23</sup> 13 AAC 85.110(b) (requiring revocation for conviction of a felony, conviction of specific misdemeanors, use, possession, or sale of controlled substances, and “discharge[] . . . as a police officer . . . for conduct that would cause a reasonable person to have substantial doubt about an individual’s honesty, fairness, and respect for the rights of others and for the laws of this state”).

<sup>24</sup> 13 AAC 85.110(a) (granting the Council discretion to revoke a certificate for falsification or omissions in a certificate application, for discharge or resignation under threat of discharge for reasons that adversely affect the officer’s ability to perform duties, and for failure to meet the basic standards for police officers).

<sup>25</sup> See 13 AAC 85.110(a)(3) (providing for discretionary revocation when an officer “does not meet the standards in 13 AAC 85.010(a) or (b)”); 13 AAC 85.010(a)(3) (explaining that a department may not hire a person as an officer unless the person “is of good moral character”).

character” may be based upon all aspects of a person’s character . . . .<sup>[26]</sup>

We must determine the amount of deference owed to the Council’s application of its regulations. The Council’s Third Amended Accusation included two counts for revocation: (1) mandatory revocation under 13 AAC 85.110(b)(3) — due to Parcell’s discharge from the Department; and (2) discretionary revocation under 13 AAC 85.110(a)(3) — due to Parcell’s lack of good moral character. In its Final Decision the Council concluded that discretionary revocation was appropriate because Parcell was not of good moral character.<sup>27</sup>

The superior court concluded that the Council’s moral character determination was not entitled to deference because moral character “is a standard eligibility requirement in professions serving the public” and “not one that requires the Council’s specialized knowledge or technical expertise.” The superior court further noted that “courts frequently consider character” and that “while the Council may be

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<sup>26</sup> 13 AAC 85.900(7).

<sup>27</sup> The Council also concluded that mandatory revocation was appropriate because Parcell was:

discharged from employment as a police officer “for conduct that would cause a reasonable person to have substantial doubt about an individual’s honesty, fairness, and respect forth [sic] rights of others and for the laws of this state and the United States or that is detrimental to the integrity of the police department where the police officer worked . . . .”

The superior court held that the Council waived mandatory revocation and that our decision in *PSEA 2010*, affirming the arbitrator’s decision that Parcell not be discharged for cause, precludes revocation under 13 AAC 85.110(b)(3). Parcell briefed this decision, but the Council limited its appeal to discretionary revocation. We therefore do not address the court’s decision on mandatory revocation under 13 AAC 85.110(b)(3).

experienced in determining good moral character, that determination does not inherently call for the Council’s expertise.” Substituting its judgment for the Council’s, the court concluded that “[t]he term ‘lacking in moral character’ should then generally refer to flaws in one’s character that are engrained, lasting or causing consistent behavioral or decision making problems.”

Substitution of judgment is not the proper standard of review in this case. The Council correctly argues that the revocation decision based on the determination that Parcell lacked good moral character was a policy determination involving agency expertise, properly reviewed for a rational or reasonable basis. “The rational basis test may be appropriate even when interpreting commonly used words, if there are technical and policy reasons to defer to the administrative agency, and especially if the legislature has granted the agency broad discretion.”<sup>28</sup>

The legislature created the Council to “establish minimum standards for employment as a police officer.”<sup>29</sup> And the legislature gave the Council discretion when making revocation decisions.<sup>30</sup> We therefore defer to the Council’s reasonable interpretation and application of its regulations.

**B. The Council Reasonably Determined That Parcell Was Not Of Good Moral Character.**

Relying on the facts that Parcell was “a person who engaged in behavior ‘totally contrary to his professional responsibility,’ ‘sexually offensive,’ and ‘as far over the line as one could imagine’ ” and that Parcell was “ ‘evasive, misleading and not

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<sup>28</sup> *W. States Fire Protection Co. v. Municipality of Anchorage*, 146 P.3d 986, 989 (Alaska 2006).

<sup>29</sup> AS 18.65.220.

<sup>30</sup> *See* AS 18.65.240(c) (“The council may deny or revoke the certificate of a police officer who does not meet the standards adopted under (a)(2) of this section.”).

forthcoming' in the investigatory process" the Council determined that Parcell was not of good moral character.<sup>31</sup>

Parcell argues that "there must be a pattern of behavior to show the lack of good moral character and not one isolated incident." In support of his argument Parcell cites cases from other jurisdictions,<sup>32</sup> but he fails to point to any precedent or clear statement establishing that this is the law in Alaska. We are not persuaded that a single transgression or incident of misconduct, no matter how egregious, never will be sufficient to support a reasonable determination that a police officer is not of good moral character. And in this case the Council relied on two separate incidents, as well as Parcell's evasive behavior during the subsequent investigation.

Parcell echoes the superior court's notation of "the Council's apparent failure to consider 'all aspects' of Parcell's character as permitted by the definition of good moral character under 13 AAC 85.900(7)." In order to show his good moral character Parcell submitted evidence to the Council that he had completed alcohol treatment and maintained his sobriety, was actively involved in his community, and that he received his local rabbi's support. The Council's decision did not explicitly mention

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<sup>31</sup> The Council also determined that Parcell's evasive behavior during the Department's investigation would be subject to a mandatory *Brady* disclosure and that this would limit Parcell's ability to effectively perform his duties as a police officer. *See Brady v. Maryland*, 373 U.S. 83, 86-88 (1963) (requiring disclosure of exculpatory information); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [the] general [*Brady*] rule." (quoting *Nupue v. Illinois*, 360 U.S. 264, 269 (1959)) (internal quotation marks omitted)). We do not address the *Brady* issue because it is not necessary for our resolution of this case.

<sup>32</sup> *See, e.g., Albert v. Fla. Dep't of Law Enforcement, Criminal Justice Standards & Training Comm'n*, 573 So.2d 187 (Fla. Dist. App. 1991); *Cuff v. Dep't of Pub. Safety Standards & Training*, 198 P.3d 931 (Or. 2008).

this evidence of Parcell’s character, but that does not mean the Council did not consider it<sup>33</sup> — the Council had no obligation to list all aspects of Parcell’s character in its decision. Even if the Council’s decision could have said more, our review is limited to determining whether the Council’s decision was reasonable.

Parcell finally argues that in his employment case the arbitrator and this court “did not conclude th[at] Parcell was dishonest” and that we have previously held that Alaska “does not have [an] explicit, well-defined and dominant public policy that requires police officers to be completely honest.”<sup>34</sup> Parcell correctly notes that in his employment case the arbitrator concluded that Parcell’s “conduct fell short of lying,” but the arbitrator’s findings that Parcell admitted lying on one occasion and that Parcell was evasive during the subsequent investigation support the Council’s conclusion that Parcell was dishonest. And the fact that there is no legal requirement to terminate a police officer’s employment for minor acts of dishonesty does not limit the Council’s discretion to revoke that officer’s certification.

The stipulated facts establish that Parcell’s harassing conduct was beyond offensive and inappropriate and that Parcell then was evasive during the Department’s review. The Council concluded, based on these specific facts, that Parcell did not have the moral character required of a police officer in Alaska. There is no evidence in the record that the Council considered inappropriate facts or failed to consider relevant facts.

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<sup>33</sup> See 13 AAC 85.900(7) (“[A] determination of lack of ‘good moral character’ may be based upon a consideration of all aspects of a person’s character.”).

<sup>34</sup> See *State v. Pub. Safety Emps. Ass’n (PSEA 2011)*, 257 P.3d 151, 161 (Alaska 2011) (“While Alaska’s laws are *explicit* in favoring an honest police force, they are not explicit in requiring a policy of absolute zero tolerance toward any dishonest by law enforcement officials, no matter how minor.” (Emphasis in original.)).

In *PSEA 2010*, when ultimately affirming the arbitrator’s decision to reverse Parcell’s termination, we expressly noted that “[i]f we were reviewing this case in the first instance, or under a less deferential standard, we likely would not have reached this conclusion.”<sup>35</sup> The Council was reviewing the case in the first instance and came to a different conclusion than the arbitrator in the employment case, and here we again review the decision under a deferential standard of review. We conclude that the Council’s revocation decision was reasonable.

## **V. CONCLUSION**

The judgment of the superior court is REVERSED and the Council’s revocation of Parcell’s police certificate is AFFIRMED.

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<sup>35</sup> 235 P.3d 197, 202 (Alaska 2010).

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FIRST JUDICIAL DISTRICT AT JUNEAU

Lance Parcell, )  
)  
Appellant, )  
)  
v. )  
)  
Alaska Police Standards Council, )  
)  
Appellee. )

Filed in Chambers  
STATE OF ALASKA  
FIRST JUDICIAL DISTRICT  
AT JUNEAU  
By GBerkey on 9/30/13

1JU-12-728CI

**ORDER REVERSING REVOCATION OF POLICE CERTIFICATE**

**I. INTRODUCTION**

This matter winds its way to this court following the reversal of Lance Parcell's ("Parcell") termination from the Alaska Department of Transportation and Public Facilities by the supreme court on June 25, 2010.<sup>1</sup> Approximately two years later, the Alaska Police Standards Council ("Council") revoked Parcell's police certificate. Based same incidents which led to his initial discharge, the Council concluded that Parcell lacks "good moral character," pursuant to 13 AAC 110(a)(3). The Council asserted 13 AAC 110(b)(3) as a second ground for revocation. Appellant, Parcell, now appeals the revocation of his certificate. For the reasons set forth below, the court reverses the Council's revocation of Parcell's police certificate.

**II. FACTUAL AND PROCEEDINGS**

Since its inception in 2006, this case has wound a serpentine path through our judicial system. The procedural posture of this case can be broken down into two phases of litigation. During the first phase of litigation, an arbitrator reinstated Parcell after his termination by the Alaska Department of Transportation and Public Facilities. This

<sup>1</sup> *State v. Public Safety Employees Ass'n*, 235 P.3d 197 (2010) [hereinafter *PSEA 2010*].



1 decision was subsequently affirmed by a superior court<sup>2</sup> and the supreme court.<sup>3</sup> The  
2 second phase of litigation, presently before the court, concerns the revocation of Parcell's  
3 police certificate by the Council.

4 **A. Incidents Giving Rise to Parcell's Termination**

5 The parties have stipulated to the facts of this case as they were presented to the  
6 arbitrator, the superior court, and the supreme court in the first phase of litigation  
7 regarding Parcell's termination. At oral argument, the parties clarified that they were not  
8 necessarily stipulating to the legal conclusions drawn from those facts by the arbitrator  
9 and courts. The facts of this case are as follows.

10 The grievant had been employed as an officer with the Department for  
11 approximately four years when he was terminated on August 24, 2006. The  
12 termination was based on two events that occurred in May 2006 while the  
13 grievant was working at the Alaska Law Enforcement Academy in Sitka,  
14 Alaska and on the grievant's conduct during the subsequent investigation.

15 On May 5, 2006, the grievant and two other training officers went to a bar  
16 in Sitka, and the grievant became extremely intoxicated. While at the bar,  
17 the grievant slid toward a female officer on a couch and made inappropriate  
18 sexual remarks, telling her "that he wanted to make her come, that he could  
19 make her scream, [and] that he could push her buttons." The female officer  
20 told him to stop, but he repeated the comments several times. Because the  
21 grievant was too intoxicated to walk home that night, another officer drove  
22 him home. When they returned to the Academy, the grievant vomited  
23 outside and then, after the hallways were cleared of recruits, he was helped  
24 into an Academy building to a room where he could sleep. The grievant  
25 apologized to the female officer in person the following day and by email  
several days later. The grievant stated during the internal investigation and  
to the arbitrator that he does not remember making these inappropriate  
remarks to the female officer.

On the evening of May 17, 2006, the grievant stared at another female  
officer while they were watching television and later sent her unwelcome

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<sup>2</sup> Opinion Re: State of Alaska's Motion for Summary Judgment, *State of Alaska v. Public Safety Employees Ass'n*, Case No. 3AN-08-06270CI, Anchorage Superior Court, Dec. 11, 2008.

<sup>3</sup> *PSEA 2010*, 235 P.3d at 197.

1 text messages in which he invited her to "go on a beer run," "go out and  
2 have fun," and join him in the room where training officers are allowed to  
3 sleep to "talk to him if she wanted." She told him to stop sending the  
4 messages, but he continued to do so. The following morning, the grievant  
5 sent the officer an email calling her his "sexy new friend," telling her she  
6 had "a great [a]ss" and "very nice tits," and stating that he wanted to see her  
7 nipple rings. The female officer wrote an email expressing her anger with  
8 his behavior, and the grievant subsequently sent her an email apology. The  
9 grievant testified at arbitration that he was up all night drinking prior to  
10 sending the email, a fact supported by the female officer's statement during  
11 the investigation that she smelled alcohol on the grievant when she saw him  
12 that morning.

13 Following these events, another officer filed a complaint regarding the  
14 grievant's behavior. Upon receiving the complaint, Lauri Burkmire, Chief  
15 of the Department, initiated an administrative inquiry, assigning a  
16 lieutenant to conduct witness interviews and a site visit. In his report, the  
17 lieutenant "concluded that Grievant's conduct violated ... Department rules  
18 relating to unbecoming conduct, courtesy, sexual harassment, private  
19 conduct and truthfulness, immoral conduct (deception), and harassment"  
20 and identified "eight instances in which he felt Grievant had been less than  
21 truthful in the investigation."

22 After reviewing the report, Chief Burkmire sent the grievant a letter  
23 directing him to attend a meeting on August 18, 2006 to discuss  
24 "inconsistencies in your claims and your honesty regarding this matter."  
25 She reminded the grievant of his obligation to be honest and warned that  
failure to do so could result in his dismissal. The grievant attended the  
meeting with his representative from PSEA and, according to the arbitrator,  
admitted that he had not been honest in his interview with the lieutenant. At  
arbitration, the grievant testified that his dishonesty in his interview during  
the investigation was limited to downplaying the extent of his drinking.  
Chief Burkmire terminated the grievant several days after their meeting.<sup>4</sup>

#### **B. Phase I Litigation: Parcell's Termination and Reinstatement**

After Parcell was terminated, the parties commenced the grievance procedure  
governed by the collective bargaining agreement between the Public Safety Employees  
Association ("PSEA") and the State of Alaska ("State").

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<sup>4</sup> *PSEA 2010*, 235 P.3d at 199-200 (footnote omitted).

1 The grievant testified at arbitration that immediately following his  
2 termination, he enrolled in an outpatient alcoholic treatment program,  
3 which he successfully completed in eight months. At the time of his  
4 testimony before the arbitrator, he claimed he had been sober for fifteen  
5 months. He acknowledged that his remarks on May 5 and his email of May  
6 18 were "inappropriate and rude," admitted that he had "failed to uphold  
7 the high standard of his profession," and stated that he was "very ashamed  
8 of his behavior."<sup>5</sup>

9 The arbitrator considered the question, "Did the Department terminate Grievant  
10 for just cause? If not, what is the appropriate remedy?" According to the following  
11 analysis, the arbitrator reinstated Parcell.

12 After defining "just cause," the arbitrator reviewed the reasons for the  
13 grievant's termination given in Chief Burkmire's letter: "(1) Grievant's gross  
14 and egregious misconduct, including gross misuse of alcohol; (2) Grievant's  
15 sexual harassment of the two female officers; and (3) Grievant's 'insincere  
16 and untruthful participation' in the investigation and review process." The  
17 arbitrator easily found that the evidence established the first offense, calling  
18 the grievant's behavior "totally contrary to [his] professional  
19 responsibility," "sexually offensive," and "as far over the line as one could  
20 imagine." The arbitrator next found that the Department could not establish  
21 that the grievant's conduct constituted either of the two recognized bases for  
22 stating a claim of sexual harassment against an employer—*quid pro quo*  
23 harassment and hostile work environment harassment. Lastly, the arbitrator  
24 found that although the Department did not establish that the grievant had  
25 lied, it did prove that he "was evasive, misleading and not forthcoming" in  
the investigatory process.

The arbitrator next considered whether the penalty of termination was  
commensurate with the proven misconduct, noting the inherent right of  
arbitrators "to review and modify penalties." He identified a number of  
mitigating factors in finding the penalty to be excessive: the grievant had  
worked for the Department for four years with no previous disciplinary  
incidents; employees who had committed similar infractions in the past,  
including being "less than truthful" in an internal investigation and  
engaging in "crude behavior at the bar," had not received as harsh a  
penalty; "something less than discharge" might have provided the grievant  
an opportunity to correct his behavior and based on the grievant's attitude at

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<sup>5</sup> *Id.* at 200.

1 the arbitration hearing, the discipline had already had a “substantial  
2 corrective effect”; and the grievant’s conduct occurred off-duty—in one  
3 instance off-site—and there was no evidence that the incidents had an effect  
4 on the Academy’s reputation.

5 The arbitrator decided to order the Department to reinstate the grievant to  
6 his position, but “only by the slimmest margin,” and concluded that the  
7 grievant was not entitled to any back pay. In effect, this decision reduced  
8 the grievant’s penalty to a sixteen-month suspension.<sup>6</sup>

9 The State appealed the arbitrator’s decision to the superior court, which affirmed  
10 that decision.<sup>7</sup> Noting that it likely would have reached a different conclusion than the  
11 arbitrator, the supreme court ultimately upheld the arbitrator’s decision on the basis of the  
12 stringent, gross-error standard.<sup>8</sup>

### 13 C. Phase II Litigation: Revocation of Parcell’s Police Certificate

#### 14 1. Third Amended Accusation and Advisory Opinion

15 After the supreme court rendered its decision in *State v. Public Safety Employees*  
16 *Association* (“PSEA 2010”), the Council served Parcell with a Third Amended  
17 Accusation on November 5, 2010. The Third Amended Accusation lodged two counts for  
18 revoking Parcell’s certificate: Count I, mandatory revocation upon discharge from  
19 employment under 13 AAC 85.110(b)(3), and Count II, discretionary revocation for lack  
20 of good moral character pursuant to 13 AAC 85.110(a)(3), 13 AAC 85.010(a)(3), and 13  
21 AAC 85.900(7).

22 13 AAC 85.110(b)(3) requires revocation of a police certificate  
23 upon a finding that the holder of the certificate . . . (3) has been  
24 discharged, or resigned under threat of discharge, from employment as a  
25 police officer in this state or any other state or territory for cause for  
conduct that would cause a reasonable person to have substantial doubt  
about an individual’s honesty, fairness, and respect for the rights of others

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<sup>6</sup> *Id.* at 200-202.

<sup>7</sup> Opinion Re: State of Alaska’s Motion for Summary Judgment, *State of Alaska v. Public Safety Employees Ass’n*. Case No. 3AN-08-06270CI, Anchorage Superior Court, Dec. 11, 2008.

<sup>8</sup> *PSEA 2010*, 235 P.3d at 202.

1 and for the laws of this state and the United States or that is detrimental to  
2 the integrity of the police department where the police officer worked.

3 13 AAC85110(a)(3) allows the Council to discretionarily revoke a certificate upon  
4 a finding that the holder of the certificate “does not meet the standards in 13 AAC  
5 85.010(a) or (b).” Under 13 AAC 85.010(a)(3), “A participating police department may  
6 not hire a person as a police officer unless the person . . . (3) is of good moral  
7 character.” Under 13 AAC 85.900(7), good moral character is defined as,

8 the absence of acts or conduct that would cause a reasonable person to have  
9 substantial doubts about an individual's honesty, fairness, and respect for  
10 the rights of others and for the laws of this state and the United States; for  
11 purposes of this standard, a determination of lack of “good moral character”  
12 may be based upon a consideration of all aspects of a person's character;<sup>9</sup>

13 The case was referred to Hearing Officer (“HO”), Brent Cole, for an advisory  
14 opinion. On June 24, 2011, HO Cole issued an Advisory Opinion concluding that the  
15 Council had failed to sustain its burden of proof on both counts I and II in the Third  
16 Amended Accusation. HO Cole found, first, that the revocation could not be sustained  
17 under 13AAC 85.110(b)(3) because that regulation requires that an officer have been  
18 discharged “for cause.” Because the arbitrator found that Parcell was not discharged “for  
19 cause,” and thus reinstated him, HO Cole rejected this ground for revocation.<sup>10</sup>

20 Second, HO Cole found that the Council failed to show that Parcell lacks good  
21 moral character, and thus, that revocation was warranted under 13 AAC 85.110(a)(3). HO  
22 Cole found that the Council failed to provide examples of what constitutes good moral  
23 character.<sup>11</sup> Further, HO Cole found that, as in *State v. Public Safety Employees*  
24 *Association*, decided in 2011 (“PSEA 2011”),<sup>12</sup> the Council had failed to articulate  
25 “sufficient legal arguments to be able to review the source of this public policy or more  
26 importantly the contours of any rule against reinstatement of officers who were found to

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24 <sup>9</sup> 13 AAC 85.900(7).

25 <sup>10</sup> Advisory Opinion at 6, R. 93, citing Arbitration Decision at 31.

<sup>11</sup> *Id.* at 7-8, R. 94-95.

<sup>12</sup> 257 P.3d 151, 161 (Alaska 2011) [*hereinafter* PSEA 2011].

1 be dishonest or evasive” or lacking in moral character.<sup>13</sup> Relying on the reasoning in  
2 *State v. Public Safety Employees Association*,<sup>14</sup> HO Cole pointed to the problem posed by  
3 the lack of an articulable standard for measuring dishonesty and moral character:

4 Does it just take one instance of being deceptive to be revoked or does this  
5 policy require a number of instances to revoke? Does it make a difference if  
6 it is under oath or not? Does it make a difference how long a peace officer  
has been employed as a law enforcement officer and have there been  
similar prior problems?<sup>15</sup>

7 According to HO Cole,

8 lacking in moral character should generally refer to flaws in one’s character  
9 that are engrained, lasting or causing consistent behavioral or decision  
10 making problems. Parcell’s conduct showed poor judgment, but absence of  
good moral character does not present itself on the face of the Arbitrator’s  
11 decision, to which the parties stipulated.<sup>16</sup>

12 Third, HO Cole found that the Council did not address whether sexual harassment  
13 was a basis for decertification in its briefing. As a result, HO Cole found the Council to  
have waived this argument.<sup>17</sup>

14 Fourth, HO Cole rejected the Council’s argument that a police officer found to be  
15 dishonest would have to disclose this information during the course of criminal discovery  
16 and proceedings under *Brady v. Maryland*.<sup>18</sup> After requesting additional briefing on the  
17 issue, HO Cole found that Council had not provided case law that would require  
18 disclosure of a finding by an arbitrator that Parcell did not lie, but that he was evasive and  
19 less than forthcoming. The HO explained, “[c]onvictions for dishonesty would be  
20 disclosable in criminal discovery, opinion testimony on the issue would be marginally  
21 relevant and not disclosable.”<sup>19</sup> For these reasons, HO Cole found against revocation.

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22 <sup>13</sup> Advisory Opinion at 8, R. 95.

23 <sup>14</sup>

24 <sup>15</sup> *Id.* at 8-9, R. 95-96.

25 <sup>16</sup> *Id.* at 9, R. 96.

<sup>17</sup> *Id.* at 9-10, R. 96-97.

<sup>18</sup> 373 U.S. 83 (1963).

<sup>19</sup> Advisory Opinion at 10, R. 97.

1                   **2. May 11, 2012 Letter to Parcell and Final Decision of the Council**

2                   At a meeting on December 6, 2011, the Council voted not to adopt HO Cole's  
3                   Advisory Opinion.<sup>20</sup> Instead, the Council voted to give Parcell an opportunity to address  
4                   the Council on several issues, arising from the advisory opinion, it intended to consider  
5                   before making a final decision.<sup>21</sup> First, the Council would consider whether there needs to  
6                   be a pattern of behavior for a reasonable person to have substantial doubts about the  
7                   person's honesty, fairness, and respect for others. Second, the Council intended to  
8                   consider whether Parcell engaged in sexual harassment, and if so, whether that amounts  
9                   to lacking good moral character as defined by 13 AAC 85.900(7). Third, the Council  
10                  would consider whether, aside from the discoverability of the arbitrator's opinion, the  
11                  opinions of those officers involved in Parcell's investigation would be discoverable, or  
12                  subject to witness testimony.

13                  The Council issued its Final Decision revoking Parcell's certification on June 18,  
14                  2012. The Final Decision adopts, verbatim, the brief of the Department of Law on behalf  
15                  of the Council, which was submitted to HO Cole for his review.<sup>22</sup> To reiterate, the  
16                  Council determined that (1) revocation was required under 13 AAC 85.110(b)(3) because  
17                  Parcell was discharged "for cause," and that (2) revocation was appropriate under 13  
18                  AAC 85.110(a)(3) because Parcell's conduct demonstrated a lack of good moral  
19                  character. Specifically, the Council found that his conduct showed a lack of respect for  
20                  the rights of others and that his "dishonesty" would prevent him from carrying out his  
21                  duties as a police officer.

22  
23  
24                  **III. LEGAL STANDARDS**

25                  <sup>20</sup> See AS 44.62.500.

<sup>21</sup> Appellant Exc. of R. at 30, Letter from John Skidmore for the Alaska Department of Law,  
                  Criminal Division to Stephen Sorensen, Counsel for Mr. Parcell.

<sup>22</sup> See Revocation of Police Office Certification Brief, *In re Parcell*, Dec. 10, 2010, R. 126.

1 Courts review findings of fact in appeals of administrative decisions under the  
2 substantial evidence' test.<sup>23</sup> Substantial evidence is 'in light of the record as a whole, ...  
3 such relevant evidence as a reasonable mind might accept as adequate to support a  
4 conclusion.' <sup>24</sup> "In determining whether evidence is substantial, ... we must take into  
5 account whatever in the record fairly detracts from its weight."<sup>25</sup>

6 The question whether Parcell was discharged "for cause," and therefore, is  
7 required to have his police certificate revoked under 13 AAC 85.110(b)(3), is a question  
8 of law. "An agency's interpretation of its own regulation [also] presents a question of  
9 law."<sup>26</sup> "Where an agency interprets its own regulation ... a deferential standard of review  
10 properly recognizes that the agency is best able to discern its intent in promulgating the  
11 regulation at issue."<sup>27</sup> In addition, in *Williams v. Abood*, the supreme court held that

12 In questions of law involving the agency's expertise, the rational basis  
13 standard will be applied and the agency's determination will be deferred to  
14 so long as it is reasonable. The rational basis standard is applied where the  
15 agency's expertise is involved or where the agency has made a fundamental  
16 policy decision. We will substitute our own judgment for questions of law  
17 that do not involve agency expertise "or where the agency's specialized  
18 knowledge and experience would not be particularly probative as to the  
19 meaning of the statute." We will "adopt the rule of law that is most  
20 persuasive in light of precedent, reason, and policy."<sup>28</sup>

21 The Council argues that the substitution of judgment standard does not apply in  
22 this case because the Council is made up of executive level law enforcement officers who

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23 *State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Corporations, Bus. & Prof'l Licensing*  
24 *v. Wold*, 278 P.3d 266, 281 (Alaska 2012), reh'g denied (June 18, 2012).

25 (citing *Wendte v. State, Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1091 (Alaska 2003)).  
26 <sup>24</sup> *Id.* (citing *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1069 (Alaska  
2011)).

27 <sup>25</sup> *Id.* (citing *Lopez v. Adm'r, Pub. Emps. Ret. Sys.*, 20 P.3d 568, 570 (Alaska 2001)).

28 <sup>26</sup> *Rose v. Commercial Fisheries Entry Comm'n*, 647 P.2d 154, 161 (Alaska 1982).

29 <sup>27</sup> *Usibelli Coal Mine, Inc. v. State, Dep't of Natural Res.*, 921 P.2d 1134, 1147 (Alaska 1996)  
(citing *Rose*, 647 P.2d at 161 (Alaska 1982)).

30 <sup>28</sup> *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002) (internal citations omitted).



1 have expertise in “judging the qualifications of those to be certified as police officers.”<sup>29</sup>

2 The court does not contest that the Council is the type of administrative body whose  
3 decisions may deserve deference.<sup>30</sup> However, deference is not based solely on the type of  
4 judicial body rendering the decision, but rather on the subject of that decision—facts  
5 versus law and decisions involving administrative expertise versus those that do not.

6 This case presents a unique situation in which the court gives weight to the  
7 Council’s general expertise in setting standards for state police officers, but the standard  
8 at issue, good moral character, is not one that requires the Council’s specialized  
9 knowledge or technical expertise. Rather, good moral character is a common standard  
10 among many professions. Good moral character is required to operate a collections  
11 agency,<sup>31</sup> to be a certified public accountant,<sup>32</sup> to be a clinical social worker,<sup>33</sup> to be a  
12 pharmacist,<sup>34</sup> to keep one’s permit to operate an employment agency,<sup>35</sup> and has long been  
13 considered a requirement for practicing law.<sup>36</sup> While good moral character may be  
14 particularly important to the police profession,<sup>37</sup> it is a standard eligibility requirement in  
15 professions serving the public. Thus, while the definition of good moral character, (if an  
16

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17  
18 <sup>29</sup> Appellee’s Br. at 5.

19 <sup>30</sup> See *Wold*, 278 P.3d at 270 (Alaska 2012), reh’g denied (June 18, 2012) (explaining that the  
20 scope of review of administrative decisions is based, in part, on the Administrative Procedure  
Act, which applies to the decisions of state boards—in that case, the Board of Certified Real  
Estate Appraisers).

21 <sup>31</sup> AS 08.24.110(a)(2).

22 <sup>32</sup> AS 08.04.110.

23 <sup>33</sup> AS 08.95.110(a)(3).

24 <sup>34</sup> AS 08.80.145(3).

25 <sup>35</sup> AS 23.15.410(a)(2).

<sup>36</sup> *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 55 (Alaska 1986); *In re Nash*, 257 P.3d  
130, 150 n.14 (Alaska 2011) (quoting *Disciplinary Matter Involving Buckalew*, 731 P.2d at 55  
n.27).

<sup>37</sup> *Shedlock v. Connelie*, 414 N.Y.S.2d 55, 56 *aff’d*, 401 N.E.2d 217 (1979) (noting that “it has  
long been recognized that, due to the nature of the police function in society, higher standards of  
fitness and character pertain to police officers than to ordinary civil service employees”).

1 agency has codified it at all),<sup>38</sup> may vary slightly between administrative bodies, the  
2 determination is not one unique to the Council.

3 In addition, courts frequently consider character. Courts make determinations  
4 regarding good moral character, when appointing a testamentary guardian.<sup>39</sup> Courts  
5 regularly consider character in criminal sentences, child custody arrangements, and  
6 termination of parental rights. One might even say that character determinations are  
7 “regular grist for judicial mills.”<sup>40</sup> Furthermore, making determinations regarding  
8 “honesty, fairness, and respect for the rights of others and for the laws,” is not unique to  
9 the Council, nor to agencies, boards or courts. Our friends, spouses, neighbors,  
10 supervisors, and clergy frequently make character judgments about us.

11 For these reasons, while the Council may be experienced in determining good  
12 moral character, that determination does not inherently call for the Council’s expertise.  
13 Finally, because the question whether Parcell was discharged for cause does not entail the  
14 Council’s expertise, the court does not give deference to the Council’s conclusion on  
15 Count I.

### 19 III. DISCUSSION

#### 20 A. The Council Waived Revocation Under 13 AAC 85.110(b)(3)

21 Revocation of a police certificate under 13 AAC 85.110(b)(3) requires that a  
22 police officer “has been discharged . . . for cause.” The Council’s revocation of Parcell’s  
23

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24 <sup>38</sup> A review of “good moral character” regulations in Alaska reveals that many agencies have  
25 included a “good moral character” eligibility requirement, but have not explicitly defined the  
term.

<sup>39</sup> *In Re Young's Estate*, 9 Alaska 158, 174 (D. Alaska 1937).

1 certificate under this regulation is somewhat unexpected in light of the letter from the  
2 Council to Parcell dated May 11, 2012,<sup>41</sup> which states, “[t]he council does not intend to  
3 take any action under Count I of the accusation since Parcell was reinstated.”<sup>42</sup>  
4 Nevertheless, the Council concluded that Parcell was discharged for cause.<sup>43</sup>

5 On appeal, however, the Council did not brief this issue. Thus, the Council waived  
6 the issue of revocation under 13 AAC 85.110(b)(3) on appeal.<sup>44</sup> Even if this argument  
7 was not waived, revocation of Parcell’s certificate could not stand under 13 AAC  
8 85.110(b)(3). The arbitrator’s decision found that Parcell was not discharged “for cause”  
9 and reversed his termination.<sup>45</sup> The arbitrator’s reversal was affirmed by the supreme  
10 court.<sup>46</sup> Thus, the Council’s conclusion that Parcell was discharged for cause under 13  
11 AAC 85.110(b)(3) contradicts the arbitrator’s decision and supreme court’s affirmance  
12 of that decision, and is thus, contrary to law.<sup>47</sup>

## 13 **B. Parcell’s Conduct Does Not Demonstrate a Lack of Good Moral Character**

### 14 **1. Respect for the Rights of Others**

15 The Council based its conclusion that Parcel lacks good moral character on its finding  
16 that he fails the “respect” prong of the definition of good moral character. The Council  
17 states,

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19 <sup>40</sup> *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 904 (Alaska 1987).

20 <sup>41</sup> Appellant Exc. 30, Letter from John Skidmore for the Alaska Department of Law, Criminal  
21 Division to Stephen Sorensen, Counsel for Parcell.

22 <sup>42</sup> *Id.*

23 <sup>43</sup> Final Decision, R. 159. The Final Decision states,

24 Was Parcell discharged from employment as a police officer ‘for conduct that  
25 would cause a reasonable person to have substantial doubt about an individual’s  
honesty, fairness, and respect forth [sic] rights of others and for the laws of this  
state and the United States or that Is detrimental to the integrity of the police  
department where the police officer worked’? The answer to this question is ‘yes.’

26 <sup>44</sup> *Barnett v. Barnett*, 238 P.3d 594, 598 (Alaska 2010) (citing *Petersen v. Mutual Life Ins. Co.*  
27 *of New York*, 803 P.2d 406, 410 (Alaska 1990)).

28 <sup>45</sup> Arbitrator’s Decision at 31.

29 <sup>46</sup> *PSEA 2010*, 235 P.3d at 202.

1 The citizens of the State of Alaska, through the Alaska Police Standards  
2 Council, grant and entrust police officers with great responsibility and  
3 power. The citizens of the State of Alaska grant the responsibility and  
4 power to police officers to investigate and hold accountable those that prey  
5 on the most vulnerable of our community . . . Police officers are able to  
6 meet their responsibilities and perform their duties only if citizens trust  
7 them to be of the highest moral and trustworthy character. Without that  
8 trust, rape victims will not provide officers the needed information that is  
9 highly private and personal in nature. Without that trust, children that  
10 have been sexually exploited will not be willing to report their abusers and  
11 provide the needed detailed information regarding the criminal actions of  
12 their fathers, step-fathers, uncles, or grandfathers.<sup>48</sup>

9 Though it is unclear, this passage may be the Council's interpretation of its good moral  
10 character regulation. However, the Council does not directly analyze Parcell's conduct in  
11 terms of the regulation. Later in the Final Decision, the Council states,

12 By his conduct and words, Parcell has demonstrated that he is not of good  
13 moral and trustworthy character. By his conduct and words, Parcell has  
14 demonstrated he is not a person the citizens of Alaska can entrust with  
15 private personal information, the lives and safety of themselves and their  
16 loved ones, and be counted on to do the right things for the right reasons.<sup>49</sup>

15 The Council bases this conclusion on the arbitrator's findings that Parcell's conduct was  
16 "totally contrary to his professional responsibility," "sexually offensive," and "as far over  
17 the line as one could imagine." In this way, the Council does not contest the findings of  
18 the arbitrator. The Council concludes, "[s]urely no one in this day and age would attempt  
19 to contend such behavior shows anything but a lack of respect for the rights of others."  
20 This conclusory statement, however, is supported by little analysis and no comparison to  
21 previous revocations of certificates based on lack of good moral character. Nor is the  
22 conclusion based on any real analysis of Parcell's conduct in light of the specific  
23 definition of good moral character contained in AS 13. 85.900(7). Rather, it appears that  
24

25 <sup>47</sup> See Advisory Opinion, R. 93 (concluding the same).

<sup>48</sup> Final Decision, R. 158.

1 the Council's decision is largely based on the principle that police officers should treat  
2 their female coworkers respectfully, with which the court whole-heartedly agrees. While  
3 the court may share this underlying expectation of police officers, it cannot endorse the  
4 Council's arbitrary interpretation of its regulation, nor its failure to apply the regulation  
5 with particularity to Parcell. In addition, for the reasons that follow, the court cannot find  
6 substantial evidence in the record to support the Council's finding that Parcell lacks good  
7 moral character.

8 The court considers the reasoning offered in HO Cole's Advisory Opinion. HO  
9 Cole explained that while certain activity may constitute "immoral character," such as  
10 homicide, sexual assault, robbery, or drug usage, a police officer may have his or her  
11 certificate revoked for such conduct under 13 AAC 85.110(b). Thus, where the Council  
12 exercises its discretion and revokes a certificate for lack of good moral character,

13 The term "lacking in moral character" should then generally refer to flaws  
14 in one's character that are engrained, lasting or causing consistent  
15 behavioral or decision making problems . . . Parcell's conduct showed poor  
16 judgment, but absence of good moral character does not present itself on  
17 the face of the Arbitrator's decision, to which the parties stipulated.<sup>50</sup>

18 Hearing Officer Cole concludes, "[c]learly there was evidence of poor judgment Parcell  
19 on several occasions; but this hearing officer cannot find that these actions demonstrate  
20 deficits in 'moral character' . . . to support a revocation."<sup>51</sup> The court agrees with HO  
21 Cole's interpretation of "good moral character" and its application in this case.

22 In addition, HO Cole's decision aligns with other courts' revocation decisions. For  
23 example, in *Hauser v. Nebraska Police Standards Advisory Council*, the Nebraska  
24 Supreme Court upheld a decision revoking a police officer's certificate for committing

25 <sup>49</sup> Final Decision, R. 159.

<sup>50</sup> Advisory Opinion, R. 96.

<sup>51</sup> *Id.*

1 numerous acts of physical and emotional domestic violence against his wife.<sup>52</sup> In cases  
2 decided by administrative courts in Florida, police officers' have had their certificates  
3 revoked for having sex with a minor over a period of years and subsequently making  
4 false statements during an internal investigation;<sup>53</sup> for failing to disclose two prior arrests,  
5 one involving the use of a fire arm, on an application for a bailiff position;<sup>54</sup> for walking  
6 into the Reno's Sports Center and robbing several poker players of \$150;<sup>55</sup> and for  
7 committing perjury in an official proceeding and having sex while on duty.<sup>56</sup>

8         Parcell's behavior towards two female trainees was offensive and reflected poorly  
9 on his judgment, particularly when under the influence of alcohol. While the court does  
10 not underplay Parcell's wrongdoing or its impact, the cases above involve crimes more  
11 severe than the conduct involved in the case at bar. Given HO Cole's reasonable  
12 definition of a person lacking good moral character, and the case law on police certificate  
13 revocation, the court cannot find substantial evidence supporting the conclusion that his  
14 conduct would raise "*substantial* doubt as to his respect for the rights of others or the  
15 law." Though the line between Parcell's conduct and conduct warranting revocation of a  
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17 <sup>52</sup> *Hauser v. Nebraska Police Standards Advisory Council*, 694 N.W.2d 171, 180 (Neb. 2005).

18 <sup>53</sup> *Dep't Of Law Enforcement, Criminal Justice Standards and Training Commission v. Dieguez*,  
19 2004 WL 833604 \*3 (Fla. Div. Admin. Hrgs.). The court relied on the following definition of  
20 good moral character,

21         not only the ability to distinguish between right and wrong, but the character to observe  
22 the difference; the observance of the rules of right conduct, and conduct which indicates  
23 and establishes the qualities generally acceptable to the populace for positions of trust  
24 and confidence. An isolated unlawful act or acts of indiscretion wherever committed do  
25 not necessarily establish bad moral character.

*Id.* (quoting *Zemour Inc. v. Div. of Beverage*, 347 So. 2d 1102 (Fla. Dist. Ct. App. 1977)).

23 <sup>54</sup> *Dep't of Law Enforcement, Criminal Justice Standards and Training Comm'n v. Savage*, 2003  
24 WL 22064739 \*2 (Fla. Div. Admin. Hrgs.). The court commented that "[I]ack of candor under  
25 oath, particularly about involvement in the criminal justice system as a defendant, is more than  
an indiscretion."

<sup>55</sup> *Department Of Law Enforcement, Criminal Justice Standards and Training Commission v. Alexander*, 1983 WL 208956 \*3 (Fla. Div. Admin. Hrgs.).

<sup>56</sup> *Mullins v. Dep't of Law Enforcement*, 942 So. 2d 998, 1000 (Fla. Dist. Ct. App. 2006).

1 police certificate may be a thin one, there is a significant distinction. Careful line-drawing  
2 is particularly appropriate when the court's conclusion results in an officer's expulsion  
3 from the law enforcement profession, not merely the loss of his or her job.<sup>57</sup>

4 The court's decision is further bolstered by the Council's apparent failure to  
5 consider "all aspects" of Parcell's character as permitted by the definition of good moral  
6 character under 13 AAC 85.900(7). Had the Council chosen, in its discretion, to consider  
7 "all aspects" of Parcell's character, it may have considered the fact that this was Parcell's  
8 first disciplinary action in his four years of employment with the Airport Police and Fire  
9 Department.<sup>58</sup> In addition, at the time the Council chose to pursue the Third Amended  
10 Accusation, the Council was aware that Parcell had successfully completed alcohol  
11 treatment, maintained his sobriety, was actively engaged in the community, and had the  
12 support of his local Rabbi.<sup>59</sup> Thus, this case appears to be an appropriate case for  
13 consideration of "all aspects" of a police officer's character.

14 For the reasons discussed above the court finds that the Council's interpretation of  
15 13 AAC 85.110(a)(3) was unreasonable and its application to Parcell was not  
16 particularized. Furthermore, the court finds that the Council's findings regarding Parcell's  
17 conduct is not supported by substantial evidence. Although Parcell's conduct was  
18 offensive and troublesome, it does not constitute bad moral character warranting  
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22 <sup>57</sup> *Shedlock*, 414 N.Y.S.2d 55, 56-57 *aff'd*, 48 N.Y.2d 943, 401 N.E.2d 217 (1979)  
(distinguishing between the loss of a job as a police officer and the loss of a police certificate).  
23 The court adds, however, that under 13 AAC 85.110(f), the Council is not precluded from  
24 revoking a police certificate by personnel decisions made by the employer of a police officer.  
The court further notes that AAC 85.110(d) allows police officers who have had their certificates  
25 revoked to petition the Council for rescission of the revocation after one year.

<sup>58</sup> *PSEA 2010*, 235 P.3d at 200.

<sup>59</sup> See Arbitrator's Decision, R. 231; Letter to the Council from Parcel, R. 438; Letter from Rabbi  
Yosef Greenberg to the Council, May 3, 2012.

1 revocation of his certificate in light of applicable case law and HO Cole’s well-reasoned  
2 analysis of the term. Therefore, the court cannot adopt the revocation on this ground.

### 3 2. Dishonesty

4 The Council found that Parcell engaged in dishonest behavior.<sup>60</sup> In its appellate  
5 brief, the Council states that “[t]he agreed upon facts, the arbitrator decision, the superior  
6 court order, and Supreme Court opinion leave no room for debate” that Parcell was  
7 dishonest during the administrative investigation.<sup>61</sup> This statement mischaracterizes the  
8 findings of these entities on a fundamental issue in this case. Neither the arbitrator nor the  
9 supreme court found that Parcell had acted dishonestly. Rather, Parcell was found to be  
10 “evasive, misleading, and not forthcoming.”

11 The arbitrator thoroughly discussed the difference between lying —knowingly  
12 making a false statement—and failures of memory that may be attributable to other  
13 reasons. The arbitrator found that Parcell was at some level of intoxication when he  
14 engaged in inappropriate, harassing behavior that he later could not recall. Further, the  
15 arbitrator found that Parcell’s evasive and not-forthcoming answers during the  
16 investigation process “raises suspicions about a person’s honesty, but alone does not  
17 support a finding that the person lied.”<sup>62</sup> This distinction should not be discounted, given  
18 the fact that the arbitrator was the only fact-finder in this case who had an opportunity to  
19 hear witness testimony and weigh the evidence first-hand.

20 The narrow distinction between dishonesty and evasive and not forthcoming  
21 behavior was pivotal in the supreme court’s opinion in *PSEA 2011*. After reciting the  
22 definition of “good moral character” under 13 AAC 85.900(7), and 13 AAC 85.110(b)(5)  
23 the court found stated, “it is unclear whether the regulation means to prohibit the  
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25 <sup>60</sup> Final Decision, R. 160, 163.

<sup>61</sup> *Id.*, R. 160.

<sup>62</sup> Arbitrator’s Decision, R. 243.



1 employment of police officers who have been dishonest to any degree or under any  
2 circumstance.”<sup>63</sup> The court elaborated,

3 While Alaska’s laws are *explicit* in favoring an honest police force they are  
4 not explicit in requiring a policy of absolute zero tolerance toward any  
5 dishonesty by law enforcement officials, no matter how minor. Nor are  
6 Alaska’s laws *well-defined* in specifying where, precisely, to draw the line  
between categorically unacceptable dishonesty and dishonesty that does not  
require termination.<sup>64</sup>

7 Most importantly, the court concluded that the Council’s discretionary authority to  
8 revoke a certificate of a police officer who does not meet the good moral character  
9 standard, suggested that there was “no categorical requirement in Alaska public policy  
10 for the termination of officers who engage in relatively minor forms of dishonesty.” This  
11 holding applies with even more force in this case concerning revocation, not termination.

12 Outside the context of arbitration, however, the Council is not required to make  
13 the same public policy showing as was required to set aside the arbitrator’s decision in  
14 *PSEA 2011*. Thus, the court looks closely at the Council’s basis for its conclusion that  
revocation was warranted on the basis of Parcell’s alleged “dishonesty.”

15 The Council’s finding that Parcell was dishonest led it to conclude that “dishonest  
16 behavior precludes him from effectively performing his duties,” such as making an  
17 application for a warrant and testifying in court.”<sup>65</sup> The Council supports this conclusion  
18 with a discussion of prosecutors’ obligation to disclose exculpatory evidence under *Brady*  
19 *v. Maryland*.<sup>66</sup> According to the Council, under *Brady*, Parcell would burden prosecutors  
20 with “an absolute, continuous, and never ending obligation to disclose information  
21 pertaining to Parcell’s conduct without a request from the defense in all cases in which he  
22 would testify at pre-trial hearings, at trial, or post-trial proceedings.”<sup>67</sup> The Council lists  
23 the possible consequences of failing to make such a disclosure, including vacated

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24 <sup>63</sup> *PSEA 2011*, 257 P.3d at 161.

25 <sup>64</sup> *Id.* at 161-62.

<sup>65</sup> Final Decision, R. 160.

<sup>66</sup> 373 U.S. 83.

1 convictions, and liability and money damages in civil suits against law enforcement,  
2 prosecutors, and prosecutors' employers.

3 The state made an identical argument to the supreme court in Phase I of this  
4 litigation.<sup>68</sup> The supreme court noted that the argument was "compelling," but found that  
5 the state had failed to preserve the issue for appeal.<sup>69</sup> In *PSEA 2011*, the state attempted  
6 the same argument.<sup>70</sup> Although the court ultimately found the argument to be waived, the  
7 court stated, "[t]he State never makes clear how the arbitrator's decision constitutes an  
8 obvious mistake under *Brady*, or how this mistake relates to the arbitrator's just cause  
9 analysis."<sup>71</sup> This court finds it equally unclear how Parcell's termination, and then  
10 reinstatement—on the ground that he was *not* dishonest—could constitute a "record of  
11 dishonesty" that could be considered exculpatory material under *Brady*. Any party  
12 attempting to discover such evidence within Parcell's personnel file would first have to  
13 make an application to the court for *in camera* review of the material prior to its  
14 disclosure.<sup>72</sup> This is no small hurdle.

14 In addition, the cases cited by the Council are inapposite and even undermine the  
15 Council's position. For example, the Council cites *Jean v. Collins*.<sup>73</sup> In that case, plaintiff  
16 sued police officers for withholding from the prosecutor impeachment evidence that  
17 eyewitnesses against plaintiff had their memories enhanced and influenced by hypnosis.  
18 The Fourth Circuit held that plaintiff had established at most negligent  
19 miscommunication between officers and prosecutor. Further, the court articulated  
20 numerous reasons why it would be inappropriate to hold police officers, who have a

21 <sup>67</sup> Final Decision, R. 162-63

22 <sup>68</sup> *PSEA 2010*, 235 P.3d at 203.

23 <sup>69</sup> *Id.*

24 <sup>70</sup> *PSEA 2011*, 257 P.3d at 165.

25 <sup>71</sup> *Id.*

<sup>72</sup> See *March v. State*, 859 P.2d 714, 717-18 (Alaska App. 1993) (requiring *in camera* review  
procedure for the discovery of confidential material) (citing *Jones v. Jennings*, 788 P.2d 732, 739  
(Alaska 1990); *Balentine v. State*, 707 P.2d 922, 929 (Alaska App. 1985); *Braaten v. State*, 705  
P.2d 1311, 1320-21 (Alaska App. 1985)).

<sup>73</sup> *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000).

1 limited, investigative role in the criminal justice system, to the strictures of *Brady*, which  
2 is the ultimate responsibility of law-trained prosecutors.<sup>74</sup> In *Houston v. Partee*, the  
3 Seventh Circuit denied absolute immunity for prosecutors where they failed to disclose  
4 exculpatory information discovered during the course of their investigation also known to  
5 police officers working on the investigation.<sup>75</sup> In *Walker v. City of New York*, the Second  
6 Circuit found the City liable for its failure to train and supervise prosecutors where a  
7 prosecutor and detective covered up key exculpatory evidence and then perjured  
8 themselves to insure defendant's conviction.<sup>76</sup>

9 These cases do not stand for the proposition that a police officer's record  
10 containing evidence that he was evasive and less than forthcoming during an internal  
11 investigation would be considered exculpatory material. Moreover, the commonality in  
12 the cases above is the connection between the exculpatory evidence held by police  
13 officers and their investigation in a specific case. Thus, one of the missing links in the  
14 Council's argument is why the arbitrator's finding of evasiveness during an internal  
15 investigation of Parcell's conduct would be relevant to an unrelated trial. Thus, the  
16 Council's fear that Parcell's "record for dishonesty" would be considered exculpatory  
17 material and discoverable "without a request from the defense in all cases in which he  
18 would testify at pre-trial hearings, at trial, or post-trial proceedings" is not supported by  
19 the case law.

20 Another concern the court would have in adopting the Council's conclusion is that  
21 it does not propose the measurable degree of dishonesty necessary for disclosure in a  
22 criminal case. Assuming the Council's position is a correct interpretation of the law,  
23 would prosecutors have to disclose that a police officer had been reprimanded for

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24 <sup>74</sup> *Id.* at 660. (finding that "to speak of the duty binding police officers as a *Brady* duty is simply  
25 incorrect . . . *Brady* duty is framed by the dictates of the adversary system and the prosecution's  
legal role therein. Legal terms of art define its bounds and limits . . . To hold that the contours of  
the due process duty applicable to the police must be identical to those of the prosecutor's *Brady*  
duty would thus improperly mandate a one-size-fits-all regime).

<sup>75</sup> *Houston v. Partee*, 978 F.2d 362, 367 (7th Cir. 1992).

<sup>76</sup> *Walker v. City of New York*, 974 F.2d 293, 295 (2d Cir. 1992).


1 misreporting his time on his weekly time-sheets? Again, the supreme court in *PSEA 2011*  
2 demands careful line-drawing in this area.<sup>77</sup> Thus, the court declines to adopt the  
3 Council's basis for finding bad moral character and revocation on this ground.

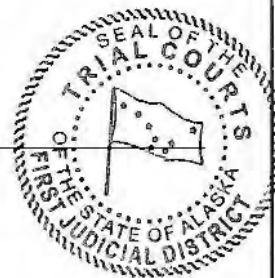
4 The Council's finding that Parcell was dishonest is not supported by substantial  
5 evidence in the record. In addition, the court cannot find legal support for the Council's  
6 conclusion that Parcell's conduct would be considered exculpatory information in cases  
7 in which he is involved, such that the arbitrator's findings would preclude Parcell from  
8 performing his duties as a police officer.

9 **V. CONCLUSION**

10 For the reasons set forth above, the court finds that the revocation of Parcell's  
11 police certificate under 13 AAC 85.110(a)(3) is not supported by substantial evidence in  
12 the record. The Council's Final Decision was not grounded in the law or the  
13 particularities of Parcell's conduct. The court GRANTS Parcell's appeal, and VACATES  
14 and REVERSES the Council's revocation of Parcell's police certificate.

15 DATED at Juneau, Alaska this 30<sup>th</sup> day of September, 2013.

16   
17 LOUIS J. MENENDEZ  
18 Superior Court Judge



19 **CERTIFICATION**

20 The undersigned hereby certifies that on the 15<sup>th</sup> day of ~~September~~ October, 2013 a true  
21 copy of the foregoing document was served on

22 Sorensen, Novak  
23 - U.S. mail

24   
25 Cathy Bohna, Appellate Clerk

<sup>77</sup> *PSEA 2011*, 257 P.3d at 161-62.

THE ALASKA POLICE STANDARDS COUNCIL

In the matter of: )  
LANCE PARCELL, )  
)  
)  
)

APSC # 2007-09

**Final Decision**<sup>1</sup>

The Alaska Police Standards Council concludes that revocation of Lance Parcell’s police certification is appropriate and necessary due to his demonstrating through his conduct and words that he is not of good moral and trustworthy character, *i.e.*, he is not a person the citizens of our great State of Alaska can entrust with private personal information, the lives and safety of themselves and their loved ones, and be counted on to do the right things for the right reasons. The Police Standards Council further concludes that Parcell’s engaging in dishonesty significantly and substantially impairs his ability to perform the responsibilities of a law enforcement officer. Failure of the Alaska Police Standards Council to revoke Parcell’s certificate would impair the ability of law enforcement statewide to achieve its mission to hold offenders accountable and protect and serve the citizens of the great State of Alaska.

**I. Agreed Upon Terms.**

The Alaska Police Standards Council and Parcell agreed to the following purposes of this revocation proceeding:

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<sup>1</sup> The undersigned, on behalf of the Alaska Police Standards Council, issues this final decision, pursuant to Alaska Statutes 44.62.500. Judicial review of this decision may be obtained by filing an appeal with the Alaska Superior Court in accordance with Alaska Statutes 44.62.560 and Alaska Appellate Rule 602(a)(2) within 30 days of the date of this decision.

(1) The parties stipulated to the accuracy of the facts previously agreed upon in connection with the appeal of the arbitrator decision in the personnel action as set forth in the January 7, 2008 arbitrator decision, December 11, 2008 order of superior court order, and *State v. Public Safety Employees Association*, 235 P.3d 197 (Alaska 2010).

(2) The parties agreed that this revocation proceeding matter was to proceed pursuant to the third amended accusation, dated November 5, 2010.

(3) The parties agreed that no evidentiary hearing or other proceeding was necessary or appropriate, beyond filing written briefing with hearing officer and affording Parcel the opportunity to be heard by the Council itself prior to the issuance of a final decision.

## **II. Question Presented.**

The question in this proceeding is whether revocation of Parcell's police certification is appropriate, whether mandatorily or discretionarily, due to Parcell demonstrating, through his conduct and words, that he is not of good moral and trustworthy character. See, 13 AAC 85.110(a)(3) and (b)(3).

## **III. Conduct in which Parcell Engaged.**

The following narrative is quoted verbatim from the Alaska Supreme Court's opinion in *State v. Public Safety Employees Association* and are the facts the Alaska Police Standards Council concludes are relevant and of significance in this proceeding: :

[Parcell] had been employed as an officer with the [Airport Police and Fire Department of the Alaska Department of Transportation] for approximately four years when he was terminated on August 24, 2006. The termination was based on two events that occurred in May 2006 while [Parcell] was working at the Alaska Law

Enforcement Academy in Sitka, Alaska and on the [Parcell's] conduct during the subsequent investigation.

On May 5, 2006, [Parcell] and two other training officers went to a bar in Sitka, and [Parcell] became extremely intoxicated. While at the bar, [Parcell] slid toward a female officer on a couch and made inappropriate sexual remarks, telling her "that he wanted to make her come, that he could make her scream, [and] that he could push her buttons." The female officer told him to stop, but he repeated the comments several times. Because [Parcell] was too intoxicated to walk home that night, another officer drove him home. When they returned to the Academy, [Parcell] vomited outside and then, after the hallways were cleared of recruits, he was helped into and Academy building to a room where he could sleep. [Parcell] apologized to the female officer in person the following day and by email several days later. [Parcell] stated during the internal investigation and to the arbitrator that he does not remember making these inappropriate remarks to the female officer.

On the evening of May 17, 2006, [Parcell] stared at another female officer while they were watching television and later sent her unwelcome text messages in which he invited her to "go on a beer run," "go out and have fun," and join him in the room where training officers are allowed to sleep to "talk to him if she wanted." She told him to stop sending the messages, but he continued to do so. The following morning, [Parcell] sent the officer an email calling her his "sexy new friend," telling her she had "a great [a]ss" and "very nice tits," and stating that he wanted to see her nipple rings. The female officer wrote an email expressing her anger with his behavior, and [Parcell] subsequently sent her an email apology. [Parcell] testified at arbitration that he was up all night drinking prior to sending the email, a fact supported by the female officer's statement during the investigation that she smelled alcohol on [Parcell] when she saw him that morning.

Following these events, another officer filed a complaint regarding [Parcell]. Upon receiving the complaint, Lauri Burkmire, Chief of the Department, initiated an administrative inquiry, assigning a lieutenant to conduct witness interviews and a site visit. In his report,

the lieutenant "concluded that [Parcell's] conduct violated... Department rules relating to unbecoming conduct (deception), and harassment" and identified "eight instances in which he felt [Parcell] had been less than truthful in the investigation.

After viewing the report, Chief Burkmire sent [Parcell] a letter directing him to attend a meeting on August 18, 2006 to discuss "inconsistencies in your claims and your honesty regarding this matter." She reminded [Parcell] of his obligation to be honest and warned that failure to do so could result in his dismissal. [Parcell] attended the meeting with his representative from PSEA and, according to the arbitrator, admitted that he had not been honest in his interview with the lieutenant. At arbitration, [Parcell] testified that his dishonesty in the interview during the investigation was limited to downplaying the extent of his drinking. Chief Burkmire terminated the grievant several day after their meeting.

[Parcell] testified at arbitration that immediately following his termination, he enrolled in an outpatient alcoholic treatment program, which he successfully completed in eight months. At the time of his testimony before the arbitrator, he claimed he had been sober for fifteen months. He acknowledged that his remarks on May 5 and his email on May 18 were "inappropriate and rude," admitted that he had "failed to uphold the high standard of his profession," and stated that he was "very ashamed of his behavior."

PSEA filed a grievance regarding the termination under its collective bargaining agreement and, as a final step, the matter went to arbitration. Arbitrator Harry MacLean held three days of hearings in November 2007 and issued a final decision on January 7, 2008. \*\*\*

\*\*\*[T]he arbitrator easily found \*\*\* [Parcell's] behavior "totally contrary to his professional responsibility," "sexually offensive," and "as far over the line as one could imagine." \*\*\* [T]he arbitrator [also] found that although the Department did not establish that the grievant had lied, it did prove that he "was evasive, misleading and not forthcoming" in the investigatory process.



#### IV. Discussion.

The citizens of the State of Alaska, through the Alaska Police Standards Council, grant and entrust police officers with great responsibility and power. The citizens of the State of Alaska grant the responsibility and power to police officers to investigate and hold accountable those that prey upon the most vulnerable of our community – children, mentally and physically challenged, and the elderly. The citizens of the State of Alaska grant the responsibility and power to police officers to protect our community members from those that engage in murder, sexual assault, sexual exploitation of children, armed robbery, and domestic violence. Police officers are able to meet their responsibilities and perform their duties only if citizens trust them to be of the highest moral and trustworthy character. Without that trust, rape victims will not provide officers the needed information that is highly private and personal in nature. Without that trust, children that have been sexually exploited will not be willing to report their abusers and provide the needed detailed information regarding the criminal actions of their fathers, step-fathers, uncles, or grandfathers. Without that trust, citizen witnesses will not be willing to come forward and report their observations of drive by shootings, home invasion robberies, and murder. Without that trust, victims of domestic violence will not call 911 to get the help they so desperately need. Police officers additionally must be able to effectively testify in court, without being subject to being subject to impeachment, in order for offenders to be held accountable.

The question for the Alaska Police Standard's Council is whether revoking Parcell's police certificate will serve or undermine the strong public policy in ensuring the public trust in police officers statewide and their ability to perform their sworn duties. By his conduct and words, Parcell has demonstrated that he is not of good moral and trustworthy character. By his conduct and words, Parcell has demonstrated he is not a person the citizens of Alaska can entrust with private personal information, the lives and safety of themselves and their loved ones, and be counted on to do the right things for the right reasons. By his conduct and words, Parcell would be subject to impeachment as a witness in court proceedings and thereby cannot effectively perform responsibilities of a law enforcement officer.

13 AAC 85.110(b)(3) mandates revocation of a certificate upon a finding that certificate holder was "discharged ... from employment as a police officer in this state...for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for rights of others and for the laws of this state and the United States or that is detrimental to the integrity of the police department where the police officer worked."

13 AAC 85.010(a)(3) provides for revocation of a certificate, in the discretion of the Alaska Police Standards Council, upon a finding that the certificate holder is not of "good moral character."

Was Parcell discharged from employment as a police officer "for conduct that would cause a reasonable person to have substantial doubt about an individual's honesty, fairness, and respect for rights of others and for the laws of this state and the United States

or that is detrimental to the integrity of the police department where the police officer worked"? The answer to this question is "yes."

Is Parcell - a person who engaged in behavior "totally contrary to his professional responsibility," "sexually offensive," and "as far over the line as one could imagine" \*\*\* [and being] "evasive, misleading and not forthcoming" in the investigatory process - of good moral character? The answer to this question is "no."

Additionally, Parcell "was evasive, misleading, and not forthcoming" in the investigative process. The agreed upon facts, the arbitrator decision, superior court order, and Supreme Court opinion leave no room to debate that Chief Lauri Burkmire and Lt. Wayne Smith are of the opinion that Parcell was dishonest in eight specific instances during the administrative investigation. Parcell's engaging the dishonest behavior renders him unable to effectively perform the duties of a law enforcement officer in connection with making applications to the court - including search and arrest warrant application, and court testimony.

It is important to recognize that the prosecution's obligation is to see that justice is done in all cases. In *Berger v. United States*, 295 U.S. 78, 88 (1935) the United States Supreme Court defined the duty as follows:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is from this fundamental duty to see that justice is done that the obligation to disclose exculpatory information flows. Alaska Rule of Professional Conduct 3.8(d), "Special Responsibilities of a Prosecutor" provides:

The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the defense made a pretrial request to examine the statements made by Brady's co-defendant, Boblit. One of the statements, in which Boblit admitted personally committing the homicide, was intentionally withheld from the defense by the prosecution. During closing argument, the defense conceded that Brady was guilty of murder in the first degree, but argued that the jury should not give him the death penalty. The jury sentenced him to death. On appeal, the United States Supreme Court ruled that Boblit's statement would have been admissible on the issue of punishment, but inadmissible on the issue of guilt. The court accordingly denied Brady a new trial, but ordered that he be afforded a new sentencing hearing while stating:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.

In *Giglio v. United States*, 405 U.S. 150 (1972), the obligation to disclose exculpatory information was extended to matters relevant to "impeachment." In that case, an unindicted coconspirator named Taliento was the key witness linking Giglio to the crime. During cross-examination, Taliento denied being promised that he would not be charged in return for his testimony. Affidavits after trial established that Taliento had in fact been promised immunity by

another prosecutor, but that the trial prosecutor did not know of the promise. The prosecution argued that there should not be a new trial, because the other prosecutor lacked authority to make the promise and failed to properly inform his supervisors or the trial prosecutor. The United States Supreme Court rejected that argument, ruling that a promise made by any prosecutor within an office is attributed to the prosecution. The court imposed the burden to implement and follow procedures in larger offices to take care of the problem. The court expressly ruled that it does not matter that the non-disclosed information was impeachment, rather than direct evidence of guilt or innocence. The “reliability of a given witness may well be determinative of guilt or innocence.”

In *United States v. Agurs*, 427 U.S. 97 (1976), the United Supreme Court further expanded the prosecution’s obligation to provide the defense exculpatory information by ruling that the duty to disclose is applicable even though there has been no request by the defense.

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), the United States Supreme Court held that “prosecutors have a duty to learn of any favorable evidence *known to others acting* on the government’s behalf, including the police.” (Emphasis added). Prosecutors thus have an obligation to seek out evidence in the possession of agencies with which they work to ensure exculpatory evidence is provided. In other words, prosecutors are imputed with knowledge of all exculpatory information known by law enforcement.

Although not controlling in Alaska state prosecutions, the Ninth Circuit Court of Appeals created an obligation on federal prosecutors in that circuit to review the personnel files of every law enforcement officer who will testify at trial to assure that all exculpatory information is disclosed to the defense. *See, United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991).

The above cited cases leave no question that the obligation of the prosecution to disclose exculpatory information is continuing, never ending, and applies to pre-trial, trial, and post-

trial proceedings. Alaska prosecutors have been trained to analyze the question as to what information must be disclosed by answering the following: "If you do not want to give it up, then you should. If it hurts, you ought to give it up. The more it hurts, the more quickly you ought to give it up. The longer you have to think it over, the sooner you ought to turn it over."<sup>2</sup>

What then are the practical implications of Parcell engaging in dishonesty during the administrative investigation in light of the above discussed law? Without question, Parcell's engaging in dishonesty and opinions that he is not honest / has a reputation for being dishonest is "exculpatory information" under the law. The prosecution therefore would have an absolute, continuous, and never ending obligation to disclose information pertaining to Parcell's conduct without a request from the defense in all cases in which he would testify at pre-trial hearings, at trial, or post-trial proceedings. The obligation is mandated by the due process provisions of the United States and Alaska constitutions as discussed above as well as Alaska Rule of Criminal Procedure 16(b)(3). Failure to comply with this obligation presents the likelihood that convictions (whether they resulted from plea negotiations or a finding of guilt following trial) will be vacated and the involved and supervising prosecutors being professionally disciplined by the Alaska Bar Association. Failure to comply with this obligation also could result in law enforcement,<sup>3</sup> prosecutors,<sup>4</sup> and the prosecutors' employers<sup>5</sup> being held liable for money damages in civil suits. In a particularly egregious case, the involved law enforcement and prosecutors were criminally prosecuted for obstruction of justice for failing to disclose exculpatory information.<sup>6</sup> Parcell would be required to disclose the information in connection with search and arrest warrant applications in which he would be the affiant. Judges

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<sup>2</sup> "Ethical Issues in the Investigation and Pretrial Stages: Dong the Right Thing for the Right Reasons" presentation at the October 3, 2001 Alaska Department of Law, District Attorney / Paralegal Conference.

<sup>3</sup> See, *Jean v. Collins*, 221 F.3d 656 (4<sup>th</sup> Cir. 2000).

<sup>4</sup> See, *Houston v. Partee*, 978 362 (7<sup>th</sup> Cir. 1992) and *Zahrey v. Coffee*, 221 F3d. 342 (2<sup>nd</sup> Cir. 2000).

<sup>5</sup> See, *Walker v. City of New York*, 974 P.2d 293 (2<sup>nd</sup> Cir. 1992).

<sup>6</sup> In the State of Illinois, the so called "Dupage Seven" – police officers and prosecutors – were prosecuted in 2000 on charges of conspiracy to obstruct justice for failing to comply with the obligation to disclose exculpatory information.

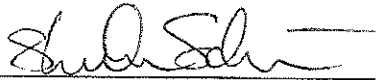
would be less likely to issue search and arrest warrants based upon his sworn affidavits or testimony. Prosecutors would be reluctant, if not refuse, to accept for prosecution cases in which the prosecutor would have to present Parcell as a witness. Prosecutors actively would attempt to present cases in which Parcell participated in the investigation in a manner so as to avoid having to put him on the witness stand. Opinion testimony that Parcell is dishonest / has a reputation for being dishonest would be admissible at all court hearings at which Parcell's credibility is at issue. *See*, Alaska Rules of Evidence 608(a) and 806. Judges would be more likely to suppress evidence in pre-trial hearings where the credibility of Parcell would be of significance. Juries more likely would tend to discredit Parcell's trial testimony. Jurors would be more likely to discredit the testimony of other officers who testified at the same trial. Parcell's testimony at any and all trials would shed a bad light on the prosecution team - law enforcement officers and prosecutors alike.

#### V. Conclusion.

The Alaska Police Standards Council concludes that revocation of Lance Parcell's police certification is appropriate and necessary due to his demonstrating through his conduct and words that he is not of good moral and trustworthy character, *i.e.*, he is not a person the citizens of our great State of Alaska can entrust with private personal information, the lives and safety of themselves and their loved ones, and be counted on to do the right things for the right reasons. The Police Standards Council further concludes that Parcell's engaging in dishonesty significantly and substantially impairs his ability to perform the responsibilities of a law enforcement officer. Failure of the Alaska Police Standards Council to revoke Parcell's certificate would impair the ability of law enforcement statewide to achieve its mission to hold offenders accountable and protect and serve the citizens of the great State of Alaska.

Revocation is mandatory pursuant to 13 AAC 85.110(b)(3) in light of Parcell having been “discharged ... from employment as a police officer in this state...for conduct that would cause a reasonable person to have substantial doubt about an individual’s honesty, fairness, and respect for the rights of others and for the laws of this state and the United States or that is detrimental to the integrity of the police department where the police officer worked.” Revocation also is compelled by 13 AAC 85.010(a)(3) due to the Council concluding that Parcell is not of “good moral character.” The citizens of the State of Alaska expect and deserve those it entrusts and empowers with the duties and responsibilities of a law enforcement officer not include Parcell.

DATED this 18 day of June, 2012 at Anchorage, Alaska.



Sheldon Schmitt  
Chair  
Alaska Police Standards Council